No. 84-1412

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX McDONALD
on her own behalf and on behalf
of all others similarly situated,

Petitioner,

v.

UNITED AIR LINES, INC.,
a corporation,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

REPLY OF PETITIONER TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. The brief in opposition of United Air Lines at once contends that the Seventh Circuit decided the merits of the burden of proof issue (Br. in Opp. 7) and that the Court of Appeals was justified in not doing so (Br. in Opp. 9). United's two contentions are inconsistent and each is erroneous. The Seventh Circuit, contrary to United's assertion (Br. in Opp. 7), explicitly held that it would not consider petitioners' challenges to the Order of Reference's allocation and quantum of proof. Thus, the court below characterized its action as "not reaching the merits of the Order of Reference." (Op. at 9, n.3, 2 App. 9a). The question raised by the petition—can petitioners be deprived of their right to appellate review concerning the correct burden of proof governing their individual reinstatement hearings—is squarely presented.

2. The approach of the AFA (Br. in Opp. 5) in attempting to characterize the proceedings below and to deny that significant questions are presented by this petition only demonstrates why great latitude must be given to district courts on matters like these.[1] The AFA attempts (Br. in Opp. 8) to analogize this to a case in which an Order of Reference to a master was made, no party objected to the fact of reference before or after until an appeal was taken on the merits, and a waiver of objection to the fact of reference was found. As AFA knows, and the district court appreciated, this case is not remotely comparable. What is involved here is an appeal from particular substantive terms of an Order of Reference. Those terms—as the Court of Appeals for the Seventh Circuit now reads them—are inconsistent with the position plaintiffs took *before* the Order of Reference was entered[2] (and continued to take after its entry[3]) that

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[1] Indeed, *Rogers v. Society International, Etc.*, 278 F.2d 268, (D.C. Cir. 1960), on which respondent AFA would rely (Br. in Opp. 8), expressly accords (at 271) the district court the widest latitude in the management of proceedings referred to a master in affirming the district court's decision not to vacate an order of reference even though it had proceeded for more than 10 years.

[2] In contrast to the cases relied upon by the respondents (UAL Br. in Opp. 13, AFA Br. in Opp. 8) where the district court had never been informed of the opposition to the reference until appeal, here the court was thoroughly informed of the arguments over the terms of the reference order before its entry. The district court referred the parties' proposals on the Order's terms to the special master for preliminary review and recommendation. (R. 557.) After the master had adopted the petitioners' suggestions on the allocation of the burden of proof, the AFA and United challenged the recommendation. (R. 575, 576.) Over petitioners' arguments that the recommended language was correct, the district court issued the Order in its present form. (R. 577, App. 34a.)

[3] Thus, petitioners expressly articulated their burden of proof contention at the outset of the hearings before the master. (R. 1239 at 9-11.) Neither United nor the AFA asserted that the petitioners had not procedurally perfected their contentions. To the contrary, counsel for United characterized the argument regarding the burden of proof as a "waste of time," because the matter was pending before the court on AFA's motion for reconsideration. (R. 1237 at 14.)

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), not *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1977), governed the burden of proof.

The AFA seeks to obscure, but does not deny, the fact that plaintiffs' position was taken *before* the Order of Reference was entered. The Seventh Circuit, however, concluded that petitioners should have taken some unspecified additional step—such as objecting to the Order once entered or appealing at an earlier time—after the Reference was entered. The court's holding overlooked that plaintiffs had persisted in their position on the burden of proof issues after the Order was entered. More importantly for present purposes, with the position indisputably advanced before the Order was entered, the issue presented in the petition is squarely raised.

3. Since the district court was fully apprised of the petitioners' position on the burden of proof before the Order was entered the "trap play" claim of the AFA (Br. in Opp. 9) is simply untrue. Also, it is not a trap play to raise on appeal a point decided against a party at an interlocutory stage of a case after final judgment.[4] Moreover the district court never found that the issue was "held back" (id.) but instead it fully reconsidered its ruling on the matter even though the hearings were underway and even though it knew that, if it had originally been wrong, a number of rehearings would be required. (S.R. 1239, Vol. 6 at 8-9, Tr. Nov. 3, 1983.)

[4] Petitioners in fact did not await the entry of a final judgment, but prosecuted this appeal on an interlocutory basis from the first orders of the district court affirming the masters' adverse recommendations in individual cases. The AFA ignores the facts that both it and United opposed the request, and instead both urged that the appellate challenge on the burden of proof issue await the completion of all the entitlement hearings. (R. 1239, Vol. 5, pp. 6-7, 16-18, Tr. Oct. 6, 1983.)

Certiorari should be granted here so that (a) inappropriate restrictions on appellate jurisdiction can be rejected, and (b) this court can reassert the principle that appropriate deference must be given to the district court actually managing complex litigation and attempting to fashion appropriate relief.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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